Employer Status Determination
Decision on Reconsideration

Carland, Inc.

Carland, Inc., was held to be an employer covered under the Railroad Retirement and Railroad Unemployment Insurance Acts in a decision dated May 11, 1990 (Legal Opinion L-90-68) and communicated to Carland in a letter dated June 8, 1990.

On June 3, 1991, Carland requested reconsideration.[1] Carland was incorporated in 1964. At that time, an employee of the Kansas City Southern Railway became president of Carland and owned 25 percent of the stock. The other 75 percent was owned, through two intervening companies (Veals, Inc, and Southern Enterprises, Inc.), by Kansas City Southern Industries, Inc. (KCS). Carland is currently 100 percent owned, through two intervening companies (Southern Credit, Inc., and Southern Group, Inc.), by KCS (Carland Brief at 3-4). KCS owns the Kansas City Southern Railway which, in turn, owns the Louisiana & Arkansas Railway Company, both of which are carriers covered under the Acts (Carland Brief at 4). KCS has not been held to be an employer under the Acts.

At any one time Carland has had from two to eight employees. It was created to provide for the leasing of small equipment by Kansas City Southern Industries affiliates. In Legal Opinion L-90-68, the Board's Deputy General Counsel found that Carland leased "railroad rolling stock, maintenance of way equipment, and automobiles." In its brief, Carland states that it also leases equipment such as car wash equipment, pool tables, beauty shop equipment, medical equipment, and restaurant equipment to unrelated parties (Carland brief at 6). Carland does not, however, dispute the finding in Legal Opinion L-90-68 that it leases railroad equipment. Moreover, the facts show that leasing of railroad equipment is Carland's major business. Of the equipment leased by Carland, the percentage leased to KCS affiliates for recent years has been 87.l percent and higher (up to 96 percent for one year, 1984). (Carland Brief at 25.)

According to Carland, it deals with KCS at "arm's length." (Carland Brief at 7.) "Carland obtains its own financing to purchase the equipment that it leases." (Ibid.) Carland retains title to equipment leased by KCS (Id.) Carland also sells used equipment when it comes off lease. (Carland Brief at 6.)

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[1]Carland submitted a memorandum brief in support of its request. Citations to this brief will be Carland Brief at __.

The definition of an employer contained in section 1(a) of the Railroad Retirement Act (45 U.S.C. § 231 (a)(1)) reads in part as follows:

> The term 'employer' shall include--
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> (i) any express company, sleeping car company, and carrier by railroad, subject to [the Interstate Commerce Act];
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> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * *. [Emphasis supplied.]

Section 1(a) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a)) provides a substantially identical definition.

Section 202.5 of the Board's regulations (20 CFR 202.5) defines a company under common control with a carrier as one controlled by the same person or persons which control a rail carrier. The absence of actual exercise of that control does not determine whether common control as provided in section 1(a)(l)(ii) exists; the right or power to exercise control is sufficient. See 20 CFR 202.4. Carland is under common control with a rail carrier employer, in that it is a wholly-owned subsidiary of Kansas City Southern Industries, Inc., which is a holding company also owning the Kansas City Southern Railway Company and the Louisiana & Arkansas Railway Company, both rail carrier employers under the Railroad Retirement and Railroad Unemployment Insurance Acts. Thus, the only issue regarding coverage of Carland under the Acts is whether it provides "service in connection with" railroad transportation.

Carland contends that it does not provide services of the type that are subject to the Interstate Commerce Act and that therefore, under applicable case law, Carland does not provide

service in connection with railroad transportation within the statutory definition of "employer" under the Acts. (Carland Brief at 13-14). Carland contends that it finds support for that argument in Itel Corporation v. U.S.Railroad Retirement Board, 710 F.2d 1243 (7th Cir. 1983), and in the legislative history of the Railway Labor Act. Carland cites Itel in support of the proposition that "the activities embraced by the RRA [and RUIA] were intended to be no broader than those embraced by the ICA (Interstate Commerce Act)" (from Itel, quoted in Carland's Brief at 13). Carland contends that since car leasing is not embraced by the Interstate Commerce Act and there was no intent to undermine the Railroad Retirement Act, it should not be a covered employer. (Carland Brief at 14.)

As noted above, section 1(a)(1)(ii) of the Railroad Retirement Act and section 1(a) of the Railroad Unemployment Insurance Act do not provide, either expressly or implicitly, that services must be subject to the Interstate Commerce Act in order to be considered to be "service in connection with" railroad transportation. Nor does the case law which has addressed that definition establish that requirement. While a divided panel of the Court of Appeals for the Seventh Circuit did state in Itel that "the activities embraced by the RRA and RUIA were intended to be no broader than those embraced by the ICA," that Court in Standard Office Building Corporation v. United States, 819 F.2d 1371 (7th Cir. 1987), expressly backed away from that portion of its discussion in Itel which tended to tie together the Interstate Commerce Act with the Railroad Retirement and Railroad Unemployment Insurance Acts. In Standard Office Building, the Court stated:

> Our attempt to yoke together the Interstate Commerce Act and the railroad retirement acts overlooked, however, the asymmetry of the regulatory schemes. 819 F.2d at 1378.

More recently, the Court of Appeals for the Seventh Circuit in Livingston Rebuild Center, Inc., v. Railroad Retirement Board, 970 F.2d 295 (7th Cir. 1992), declined to follow Itel in regard to limiting the coverage of the Railroad Retirement and Railroad Unemployment Insurance Acts to services which are covered under the Interstate Commerce Act, and rebutted contentions to the contrary deriving from the legislative history of the Railway Labor Act and the Railroad Retirement Act. Livingston Rebuild Center rebuilt locomotives and other rolling stock, about 25 percent of its business being with its

affiliated carrier. The Court found that rebuilding locomotives constituted a service in connection with rail transportation, stating in regard to the legislative history of the Railroad Retirement Act that:

> *** * *** Nothing in what Congress enacted links the Railroad Retirement Act to the Interstate Commerce Act; neither the phrase 'service . . . in connection with the transportation of passengers or property by railroad' nor any close approximation appears in the jurisdictional provisions of the Interstate Commerce Act. Senator Wagner thought that the text of the Railroad Retirement Act encompassed more than the Interstate Commerce Act did, 81 Cong. Rec. 6223 (1937), and the committee report implies that the Railroad Retirement Act is broader. S. Rep. No. 697, 75th Cong., 1st Sess. 7 (1937). [970 F. 2d at 298.]

Based on the more recent decisions of the Seventh Circuit Court of Appeals, the Board concludes that insofar as Itel could be read as standing for the proposition that car leasing does not constitute service in connection with railroad transportation, as argued by Carland (Carland Brief at 13-14), it is no longer good law.

Carland leases rail cars and other rail equipment to its rail affiliates. For the last several years, more than 87 percent of its business has been with those affiliates. (Carland Brief at 25). (Compare Itel, where "about 12 percent of the Rail Division's railcars are leased to these subsidiary railroads and less than 5 percent of Rail Division employees are involved in transactions with subsidiary railroads.") The type of service provided by Carland is vital to railroad transportation: a railroad cannot function without railcars and other rail equipment. See Despatch Shops, Inc. v. Railroad Retirement Board, 153 F. 2d 644 (D.C. Cir. 1946); and Livingston Rebuild Center, 970 F. 2d at 297, 298.

Carland also argues in its Brief that the Board's determination that Carland is an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act is inconsistent with the Board's prior decisions and thus has no reasonable basis in law. (Carland Brief at 29.) Each of the prior decisions of the Board cited by Carland to support its contention in this regard is factually distinguishable from this case.

The first decision cited in this connection by Carland is Board Order 83-113 (1983), regarding the appeal of Funding Systems Railcars, Inc. from the determination of the Board's General Counsel that it was an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act. Funding Systems Railcars, Inc., was in the business of arranging the purchase and financing of freight cars and managing them through lease or management arrangements with freight car owners or manufacturers. It had apparently operated for some time before coming under common control with a rail carrier employer. For the year 1979 and the nine-month period ended September 30, 1980, revenues from its two rail carrier subsidiaries constituted only about 4 percent of Funding Systems' revenues. Given the similarity of the business conducted by Funding Systems and the Rail Division of Itel Corporation, as well as the very small percentage of revenue from rail carriers involved in both cases, the Board reasonably decided to apply the decision in Itel in reversing the determination that Funding Systems was an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

Carland next cites Board Order 85-16 (1985), which reversed the General Counsel's determination that certain subsidiaries of Emons Industries were employers under the Railroad Retirement Act and the Railroad Unemployment Insurance Act. At issue in the appeal of Emons Industries was the employer status of three subsidiaries of Emons Industries, which itself had already been held not to be an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act. The principal business of one of those subsidiaries was leasing railcars to the general railroad industry, and the principal business of the other two subsidiaries was the repair of railcars for the leasing company subsidiary. Neither of Emons Industries' two subsidiary railroad companies owned freight cars, and therefore they did not directly use the repair companies to repair cars that they owned. One of the railroad subsidiaries used the services of one of the repair companies to repair cars belonging to other railroads that it hauled in interchange. This work amounted to only 4.4 percent of the car repair work at one of that railroad's business locations; again, an extremely small percentage.

The Board's decision in the present case is not inconsistent with the Board's decisions in regard to Funding Systems and Emons. The types of activities conducted both by the non-carrier subsidiaries of Emons Industries and by Funding Systems differ from the type of work performed by Carland. Although two of Emons' subsidiaries engaged in the repair of railcars,

they did so for Emons' leasing company subsidiary, and not directly for an affiliated rail carrier. The leasing car activities conducted by Funding Systems and by one of Emons' subsidiaries were, given the insignificant amount of business conducted with the rail carrier affiliates, determined by the Board to be controlled by the decision in Itel. In addition, the existence of Funding Systems, like that of the Rail Division in Itel, predated its coming under common control with its rail carrier affiliates.

Finally, in addition to being factually distinguishable from the situations at issue in the Funding Systems Railcar and Emons cases, that portion of the Court's decision in Itel, upon which the Board's rulings in those cases was founded is, as noted above, no longer good law in view of the Seventh Circuit's later decisions in Standard Office Building v. United States (1987) and Livingston Rebuild Center Inc. v. Railroad Retirement Board (1992). Accordingly, the Board is not bound to follow the decisions in Funding Systems Railcar and Emons.

Accordingly, on reconsideration the Board affirms the legal opinion of May 11, 1990, holding Carland to be an employer under the Acts since January 14, 1964.

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In Railroad Retirement Board v. Duquesne Warehouse Co., 149 F.2d 507 (D.C.Cir. 1945), aff'd 326 U.S. 446, 90 L.Ed. 192, 66 S.Ct. 238 (1946), the Court of Appeals held that a warehouse corporation owned by a railroad and engaged in loading and unloading railroad cars and other handling of property transported by railroad, and in other activities which enabled the railroad to perform its rail transportation more successfully, was performing "services in connection with" the transportation of property by railroad and therefore an employer under the Railroad Unemployment Insurance Act. The Court of Appeals quoted from the opinion of the Railroad Retirement Board which had held that Duquesne was an employer under the Act:

> In light of the general purpose of the * * * [Railroad Unemployment Insurance Act] and accepted doctrines of statutory construction, the Board has construed the carrier affiliate coverage provision as denoting services which are an integral part of, or are closely related to, the rail transportation system of a carrier and as including within its coverage (l) carrier affiliates engaged in activities which are themselves railroad transportation or which are rendered in connection with goods in the process of transportation, such as loading and unloading railroad cars, receipt, delivery, transfer in transit, and other handling of property transported by railroad; and also (2) carrier affiliates engaged in activities which enable a railroad to perform its rail transportation, such as maintenance and repair of way and equipment, and activities which enable a railroad to operate its rail system more successfully and to improve its services to the public such as auxiliary bus transportation, dining facilities, and incidental warehousing services.
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> We agree with the Board's construction of the Act. It follows the ordinary meaning of the words used in the statute. It achieves a common sense result well within what we conceive to be the policy of Congress, i.e., to cover the business of railroading as it is actually carried on. (Footnote omitted.) 149 F.2d at 509.

In finding that Carland provides service in connection with

railroad transportation, the Board follows the ordinary meaning of the words used in the statutory definition. A fundamental rule of statutory construction is that unless otherwise defined, words in a statute will be interpreted as taking their ordinary, contemporary, common meaning. Perrin v. United States, 444 US. 37, 42, 62 L.Ed. 2d 199, 204, 100 S.Ct. 311 (1979). The word "connection" ordinarily means a relationship or association. Carland leases railway equipment, including rail cars, to affiliated railroads. Since such equipment is essential to the transportation of property or passengers by rail, the provision of such cars is service in connection with railroad transportation within the statutory definition of "employer", applying the ordinary meaning of the words used in the statute.

Carland is under common control with rail carrier employers; it leases railcars and other rail equipment and devotes more than 87 percent of its leasing business to the railroad industry. Carland's argument that it does not provide service in connection with railroad transportation because it is not subject to the Interstate Commerce Act attempts to incorporate a requirement into the statute that is not there and ignores those decisions which have held activities which are not subject to the Interstate Commerce Act to be service in connection with railroad transportation. See, e.g., Adams v. Railroad Retirement Board, 214 F. 2d 534 (9th Cir. 1954), (Accounting services, the services of a purchasing department, the service of caring for and replacing poles in an overhead trolley system, stenographic service, bridge and building service, and repair service conducted by a railroad subsidiary which was in the electric utility business constituted service in connection with railroad transportation); Southern Development Company v. Railroad Retirement Board, 243 F. 2d 351 (8th Cir. 1957) (Corporation which owned a building and leased most of the space therein to a railroad for the railroad's general offices and ticket offices was held to be providing service in connection with railroad transportation); and Railroad Concrete Crosstie Corporation v. Railroad Retirement Board, 709 F. 2d 1404 (11th Cir. 1983) (Wholly owned subsidiary of a railroad which provided the vast majority of concrete crossties which it manufactured to that railraod was held to be providing service in connection with railroad transportation.) See also, Atlantic Land & Improvement Company v. United States, 790 F. 2d 853 (11th Cir. 1986), concerning a determination of employer status under the Railroad Retirement Tax Act where a subsidiary of a railroad operated a phosphate loading facility.

There are instances where the service performed by a company under common control with a rail carrier is service which is not inherently connected with railroad transportation.

However, because of the particular circumstances involved in a case, such service may be found to be service in connection with railroad transportation. See, e.g., Adams v. Railroad Retirement Board, 214 F.2d 534 (9th Cir. 1954). The case of Carland requires no such indirect analysis. The leasing of rail cars and other rail equipment is inseparably connected to railroad transportation. Where, as is the case with Carland, such service is performed by a company which is under common control with a rail carrier employer and where such service is not casual, it constitutes service in connection with railroad transportation within the meaning of section 1(a)(1)(ii) of the Railroad Retirement Act (45 U.S.C. §231(a)(1)(ii)) and section 1(a) of the Railroad Unemployment Insurance Act (45 U.S.C. §351(a)). The company which performs such service is thus a covered employer under those Acts.